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Larry R. Soward, *Commissioner*  
Glenn Shankle, *Executive Director*



TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

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CHIEF CLERK'S OFFICE

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

February 26, 2007

LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

RE: **DALVANT CORPORATION**  
**TCEQ DOCKET NO. 2006-1762-AIR**

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Request for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Emily A. Collins".

Emily A. Collins, Attorney  
Public Interest Counsel

cc: Mailing List

Enclosure



2007 FEB 26 PM 3:10

CHIEF CLERKS OFFICE

## TCEQ DOCKET NO. 2006-1762-AIR

IN THE MATTER OF THE  
APPLICATION OF DALVANT  
CORPORATION FOR RENEWAL OF  
AIR QUALITY PERMIT NO. 674

§  
§  
§  
§

BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

THE OFFICE OF PUBLIC INTEREST COUNSEL'S  
RESPONSE TO REQUEST FOR HEARING

COMES NOW, the Office of Public Interest Counsel ("OPIC") of the Texas Commission on Environmental Quality (the "Commission" or "TCEQ") and files this Response to Hearing Request in the above-referenced matter, and would respectfully recommend that the Commission find that no right to a hearing exists on this application for renewal of an air permit that does not authorize an increase in allowable emissions or the emission of a new contaminant.

I. INTRODUCTION

The Dalvant Corporation ("Dalvant" or "Applicant") submitted an application to TCEQ for renewal of Air Quality Permit No. 674 on July 11, 2005. The renewal would authorize the Applicant to continue operations of the Tawakoni Gas Plant, located on County Road 330, about 8 miles North of Highway 80 on Farm to Market Road 429, in Kaufman County. According to the Executive Director's Response to Public Comments (hereinafter "RTC"), the renewal application does not include all units previously authorized under the original permit.<sup>1</sup> The Executive Director anticipates that removal of the units will reduce the amount of permitted emissions by 330 tons per year of sulfur dioxide and four tons per year of hydrogen sulfide.<sup>2</sup>

The Executive Director (hereinafter "ED") declared the application administratively complete on July 21, 2005. The applicant published a Notice of Receipt of Application and

<sup>1</sup> Executive Director's Response to Public Comment, Response 1, dated September 28, 2006.

<sup>2</sup> *Id.*

Intent to Obtain an Air Permit Renewal on August 19, 2005, in the *Terrell Tribune*. TCEQ received a timely hearing request from Yvonne and Dale Perkins on August 31, 2005. The public comment period ended on September 5, 2005. The ED issued a Response to Public Comment on September 28, 2006.

Based on the information submitted in the request and a review of the information available in the Chief Clerk's file on this application, OPIC recommends denying the hearing request due to the statutory prohibition against holding a public hearing on a "renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted."<sup>3</sup>

## II. APPLICABLE LAW

The Executive Director declared this application administratively complete on July 21, 2005. As the application was declared administratively complete after September 1, 1999, a person may request a contested case hearing on the application pursuant to the requirements of Texas Health and Safety Code section 382.056 added by Act 1999, 76<sup>th</sup> Leg., ch. 1350 (commonly known as "House Bill 801"). Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in

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<sup>3</sup> Tex. Health and Safety Code § 382.056(g) (2006).

the public notice of the application. 30 TEXAS ADMIN. CODE (hereinafter "TAC") § 55.201(d) (2006). Hearing requests must be submitted to the Chief Clerk's Office in writing no later than 30 days after the Chief Clerk's transmittal of the Executive Director's Response to Comments. 30 TAC § 55.201(c).

Under 30 TAC section 55.203(a), an "affected person" is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." This justiciable interest does not include an interest common to the general public. *Id.* Relevant factors that will be considered in determining whether a person is affected include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC § 55.203(c).

The Commission shall grant an affected person's timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the Commission's decision on the application. 30 TAC § 55.211(c).

Accordingly, responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or law;
- (4) whether the issues were raised during the public comment period;

- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the Chief Clerk prior to the filing of the Executive Director's Response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

30 TAC § 55.209(e).

### III. DISCUSSION

#### **A. A Right to Hearing Does Not Exist on Dalvant's Renewal Application because the Renewal Will Not Result in an Increase in Allowable Emissions or the Emission of an Air Contaminant Not Previously Emitted.**

As an initial matter, the Commission must determine whether a right to a contested case hearing exists on this application. No right to a contested case hearing exists on a renewal application under Chapter 382 of the Texas Health and Safety Code if the application would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted.<sup>3</sup> However, notwithstanding THSC section 382.055(g), the Commission may hold a hearing on a permit renewal "if the commission determines that the application involves a facility for which the applicant's compliance history is in the lowest classification under Section 5.753 and 5.754, Water Code, and rules adopted and procedures developed under those sections." TCEQ rules allow the Commission to hold a contested case hearing in the following circumstance: "if the application involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the

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<sup>3</sup> Tex. Health & Safety Code (hereinafter "THSC") § 382.056(g), (o); 30 TAC §§ 55.201(i)(3)(C); 55.211(d)(2).

regulatory process, including the failure to make a timely and substantial attempt to correct the violations.”<sup>4</sup>

Based on the technical review, the Executive Director's RTC, and the public notice, OPIC concludes that the renewal will not result in increased allowable emissions or the emission of an air contaminant not previously emitted. In fact, the renewal action will reduce the amount of permitted annual emissions by virtue of the removal of several inactive units from the permit altogether.<sup>5</sup> According to the technical review, the facility has been inactive for over ten years except for a flare that continues to burn residual gas from a well. Only the flare has been included in the draft permit renewal.<sup>6</sup> The technical review states that the glycol dehydrator reboiler, the amine still reboiler, and the condensate tank are being removed from the permit with a resulting reduction of permitted annual emissions by 330 tons per year of SO<sub>2</sub> and four tons per year of H<sub>2</sub>S.<sup>7</sup>

With regard to the Applicant's compliance history, between September 01, 2001 and August 31, 2006 both the site and company ratings and classifications were 3.01 or average. The Executive Director states in his Response to Public Comment that investigations in 2003 and 2005 for odors did not result in NOVs, and, thus, were not included in Dalvant's compliance history. Therefore, OPIC cannot recommend that a right to hearing exists based on the Applicant's compliance history.

Based on a review of the criteria set forth in THSC section 382.056(g) and (o), OPIC concludes that there is no right to a hearing on this renewal application. In the event the Commission disagrees, the OPIC offers the following analysis set forth below.

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<sup>4</sup> 30 TAC § 55.201(i)(3)(C); *see also* 30 TAC § 55.211(d)(2).

<sup>5</sup> Permit Renewal Technical Review Analysis, Dalvant Corporation, Permit No. 674, dated November 1, 2006.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

## **B. Affected Person Analysis**

If the Commission decides that a right to hearing exists on this application, Yvonne and Dale Perkins have a personal justiciable interest related to a legal right affected by this application. The proximity of the Perkins' residence to the proposed facility combined with their interests regarding health effects, nuisance odors, and the Applicant's compliance history support a finding that Yvonne and Dale Perkins are "affected persons."<sup>8</sup> The Perkins' hearing request states that they reside approximately one mile from the facility. The Perkins state concerns protected by the law under which the application will be considered, including health,<sup>9</sup> nuisance odors,<sup>10</sup> and compliance history.<sup>11</sup> Such interests reasonably relate to the potential effects of flaring to burn residual gas.<sup>12</sup> In addition, the Perkins reside within approximately a mile of the facility, which also shows a reasonable relationship between the interests stated and the activity regulated.<sup>13</sup> Furthermore, nuisance odors may affect the requestors' health and their use of their property.<sup>14</sup> Therefore, if the Commission finds a right to hearing exists on this application, OPIC recommends that the Commission find that Yvonne and Dale Perkins are affected persons.

## **C. Issues Analysis**

The hearing request collectively raise the following issues:

- (1) Will the facility adversely affect the hearing requestors' health;

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<sup>8</sup> 30 TAC § 55.203(c).

<sup>9</sup> THSC § 382.0518(b)(2) (2006).

<sup>10</sup> 30 TAC § 101.4 (2006).

<sup>11</sup> THSC § 382.055(d) (2006); 30 TAC § 60.1(a)(1)(A) (2006).

<sup>12</sup> 30 TAC § 55.203(c)(3). The Notice of Receipt of Application and Intent to Obtain an Air Permit Renewal for this application states that the facility will emit organic compounds, nitrogen oxides, sulfur dioxide, carbon monoxide, hydrogen sulfide, and PM<sup>10</sup>.

<sup>13</sup> *Id.*

<sup>14</sup> 30 TAC § 55.203(c)(4).



- (2) Will the facility cause nuisance odors; and
- (3) Does the Applicant's compliance history justify modification or denial of the permit?

**1. The hearing requestor raise issues disputed by the parties.**

No agreement exists between the parties on the issues discussed above. In the ED's Response to Comments, dated September 28, 2006, the ED stated that TCEQ is proscribed from reviewing the permit renewal application.<sup>15</sup> In addition, the Executive Director's responses indicate that he has reviewed the Applicant's compliance history to determine that additional restrictions or requirements are not justified.<sup>16</sup> As evidenced from the hearing request, the requestors dispute the position of the ED on these issues. Therefore, the issues set forth above are disputed.<sup>17</sup>

**2. The hearing requestors raise issues of fact.**

The requestors raise specific factual issues in their hearing requests about the Applicant's compliance history, nuisance odor conditions, and health concerns. As these are issues of fact, rather than issues of law or policy, these issues are appropriate for referral to hearing.<sup>18</sup>

**3. The hearing requestors raise issues similarly raised in comments on the application.**

The hearing requestors filed their requests for hearing during the public comment period. The Executive Director appears to have based his Response to Comments on the issues raised in the hearing requests. The issues that were raised during the comment period have not been

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<sup>15</sup> Executive Director's RTC, Response 1, dated September 28, 2006.

<sup>16</sup> Executive Director's RTC, Response 1, dated September 28, 2006.

<sup>17</sup> 30 TAC §§ 50.115(c)(1); 55.201(d)(4); 55.209(e)(2); 55.211(c)(2)(A).

<sup>18</sup> 30 TAC § 55.211(b)(3)(A), (B).

withdrawn. Therefore, the issues raised in the hearing request were also raised during the public comment period.<sup>19</sup>

**4. The issues raised regarding nuisance odors, the Applicant's compliance history, and the effect of emissions on the hearing requestors' health are relevant and material to the Commission's decision on this application.**

The hearing request raises issues which are relevant and material to the Commission's decision on this application under the requirements of 30 TAC sections 55.201(d)(4) and 55.211(c)(2)(A). The factual issues raised by the hearing requestors relate directly to whether the applicant will meet the requirements of applicable substantive law.<sup>20</sup>

In accordance with THSC section 382.0518(b)(2), the Commission may grant a permit to construct a facility "if, from the information available to the commission, including information presented at any hearing held under Section 382.056(k), the commission finds:...(2) no indication that the emissions from the facility will contravene the intent of this chapter, including protection of the public's health and physical property." Therefore, the facility's effect on the hearing requestors' health is relevant and material to the Commission's decision on this application.<sup>21</sup>

Pursuant to 30 TAC section 101.4, the Applicant shall not "discharge...air contaminants...in such concentration and of such duration as are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation, or property, or as to

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<sup>19</sup> 30 TAC §§ 55.201(c), (d)(4); 55.211(c)(2)(A).

<sup>20</sup> See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251 (1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated the following: "[a]s to materiality, the substantive law will identify which facts are material...it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.")

<sup>21</sup> 30 TAC § 55.209(e)(6) (2006).

interfere with the normal use and enjoyment of animal life, vegetation, or property.”<sup>22</sup>

Therefore, nuisance odor and particulate considerations must be taken into account in the Commission's determination on this application.

The Perkins' concern about the Applicant's failure to “consistently operate the plant in a manner that complies with air quality standards” relate to the Commission's consideration of the Applicant's compliance history. In accordance with Texas Health and Safety Code section 382.055(d), and 30 TAC sections 60.1(a)(1)(A) and 60.3(a)(1), the Commission must consider an Applicant's compliance history in making a decision regarding issuance of a permit renewal. Therefore, the issue of the Applicant's compliance history is relevant and material to the Commission's decision on this application.

**5. OPIC recommends that the Commission refer the issues regarding the Requestors' health, nuisance odors and compliance history to SOAH.**

In light of the requirements of 30 TAC sections 50.115(b) and 55.211(b)(3)(A)(i), OPIC recommends that any referral to the State Office of Administrative Hearings (“SOAH”) include the following issues:

- (1) Will the facility cause nuisance odor conditions? (Yvonne and Dale Perkins' hearing request, dated August 31, 2005);
- (2) Will the facility adversely affect the health of Yvonne and Dale Perkins? (Yvonne and Dale Perkins' hearing request, dated August 31, 2005); and
- (3) Does the Applicant's compliance history justify modification or denial of the permit? (Yvonne and Dale Perkins' hearing request, dated August 31, 2005).

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<sup>22</sup> See also 30 TAC § 111.155 (2006).

**D. OPIC Estimates that the Maximum Expected Duration of Hearing will be Six Months.**

Commission rule 30 TAC section 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall proceed longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. In assisting the Commission to state a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC section 55.209(e)(7), OPIC estimates that the maximum expected duration of hearing on this application would be six months from the first date of the preliminary hearing until the proposal for decision is issued.

**IV. CONCLUSION**

For the reasons set forth above, the Office of Public Interest Counsel respectfully recommends that the Commission find that no right to a hearing exists on this application for renewal of an air permit that does not authorize an increase in allowable emissions or the emission of a new contaminant. However, if the Commission finds that a right to hearing exists on this application, OPIC recommends granting the contested case hearing request of Yvonne and Dale Perkins and refer this matter to the State Office of Administrative Hearings for a hearing on the issues described above.

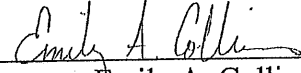
Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 26, 2007, the original and eleven true and correct copies of the Office of Public Interest Counsel's Response to Request for Hearing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.

  
\_\_\_\_\_  
Emily A. Collins

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**TCEQ DOCKET NO. 2006-1762-AIR**

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